UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA,

Plaintiff,

And

NATURAL RESOURCES DEFENSE COUNCIL, INC. AND SIERRA CLUB,

Intervenor-Plaintiffs,

v.

DTE ENERGY COMPANY AND DETROIT EDISON COMPANY,

Defendants.

Civil Action No.
2:10-cv-13101-BAF-RSW

Judge Bernard A. Friedman

Magistrate Judge R. Steven Whalen

PLAINTIFF UNITED STATES' MEMORANDUM IN SUPPORT OF ITS MOTION FOR A PROTECTIVE ORDER AND OPPOSITION TO DEFENDANTS' MOTION TO COMPEL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Rules

Other References

STATEMENT OF ISSUES PRESENTED

Did the United States comply with Federal Rule of Civil Procedure 34(b) by producing documents in accordance with Defendants' explicit instructions to produce documents as they are kept in the files, by providing details about the origin of the documents, and by providing the documents in a searchable format?

Yes.

Does the unreasonable burden of searching through an estimated 1.9 million emails, 1,4034 Gigabytes (GB) of electronic documents, and nearly a mile worth of paper documents outweigh the likely benefit of searching EPA offices that are unrelated to this case in light of the duplicative nature of the discovery and the voluminous discovery that DTE has already received?

No.

Did the United States' provide adequate responses to DTE's interrogatories?

Yes.

CONTROLLING AUTHORITY

Burt Hill, Inc. v. Hassan, No. Civ.A. 09-1285, 2010 WL 419433 (W.D. Pa. Jan. 29, 2010)

Case v. Goodyear Tire & Rubber Co., No. C87-1445A, 1989 WL 418792 (N.D. Ohio June 13, 1989)

In re Classicstar Mare Lease Litig., No. 5:07-cv-353, 2009 WL 260954 (E.D. Ky. Feb. 2, 2009)

Liddle v. Bd. of Educ. of City of St. Louis, 771 F. Supp. 1496 (E.D. Mo. 1991)

Radian Asset Assur., Inc. v. College of the Christian Bros. of New Mexico, No. Civ. 09-0885, 2010 WL 4928866 (D.N.M. Oct. 22, 2010)

Renda Marine, Inc. v. United States, 58 Fed. Cl. 57 (Fed. Cl. 2003)

Standard Dyeing & Finishing Co. v. Arma Textile Printers Corp., No. 85-cv-5399, 1987 WL 6905

Surles ex rel. Johnson v. Greyhound Lines, Inc., 474 F.3d 288 (6th Cir. 2007)

World Healthcare Sys., Inc. v. Surgical Servs., Inc., No. 10-cv-60, 2011 WL 849318 (E.D. Tenn. Mar. 8, 2011)

Fed. R. Civ. P. Rule 26(b)(2)

Fed. R. Civ. P. 34(b)

DTE has received all the information it needs to prepare for trial, and more. Indeed, given that this case is about *DTE's* conduct, the quantity of discovery produced from the federal government's files has been nothing short of extraordinary. This motion is about a demand that the United States re-organize the information already provided and revisit a document search of EPA offices not directly involved in this case. Neither is required by the rules nor likely to significantly aid Defendants' preparation for trial. This case directly impacts public health, and should not be further delayed based on unreasonable discovery demands.

As shown below, DTE's motion is without merit. The United States has fully met its obligations in response to DTE's extraordinarily broad discovery requests. The United States has produced documents with appropriate information regarding the origin of the documents and in a searchable format, which will allow DTE to locate the material that it seeks. Moreover, the United States has produced documents consistent with DTE's specific instructions and in the same manner as prior cases involving DTE's trial counsel.

DTE also seeks to waste time and taxpayer dollars to require the United States to undertake a burdensome and duplicative review of regional offices of the Environmental Protection Agency ("EPA") with no responsibility for regulating DTE's plants, and with no authority to administer or implement the Michigan State Implementation Plan applicable to DTE's plants. In light of the voluminous information that has already been produced in response to DTE's overly broad requests, the burden of such a search cannot be justified and DTE's motion should be denied in its entirety. The United States has already provided DTE with the documents that were produced as a result of nationwide searches requiring hundreds of thousands of hours and millions to complete. *See, e.g.,* Ex. 1 (Decl. of Schnare) at ¶3. In addition, the United States has now gone back to search Region 5 and Headquarters, the EPA

offices charged with administering and enforcing the Clean Air Act in the Midwest and nationally and has produced an additional 286,000 pages of responsive material so far. *See* Ex. 2 (Decl. of Walinskas) at ¶13. The burden of DTE's request to go back and search regional offices unrelated to this case are not justified by the costs to the public in EPA's time and the delay of trial that would be required. *See generally* Ex. 3 (Decl. of Palermo) at ¶14. The company's motion should be denied so that the Parties may address the merits of this case.

BACKGROUND

I. Discovery Timeline and History

Given the public health issues at stake, on January 19, 2011, the Court indicated that it believed an expedited trial was appropriate in lieu of ruling immediately on the motion for a preliminary injunction. *See* Ex. 4 (Jan. 19, 2011 Hearing Transcript) at 136-38. When discussing potential trial dates, DTE requested that trial be set 120 days from January 19, 2011. *Id.* at 144. Ultimately, the Parties and the Court agreed on a discovery schedule, including a May 11, 2011 trial date, nearly 120 days from the preliminary injunction hearing as DTE requested. *Id.* at 147. On January 28, 2011, the United States served requests for production of documents. *See* Dkt. 87, Ex. A.

On February 1, 2011, DTE served its First Set of Request for Production on the United States. DTE's requests asked for documents from every agency within the Federal government – even obviously irrelevant agencies such as the Federal Bureau of Prisons. *See* Dkt. 87, Ex. D at Definition 13. DTE's requests are unbounded in time or seek all documents since 1970, explicitly included Clean Air Act provisions that are not at issue in this case, and requested information about state regulations outside of Michigan. *See* Dkt. 87, Ex D.

On February 10, 2011, just nine days later, the United States sent its initial objections to DTE's request. *See* Dkt. 87, Ex. E. The United States' primary concern was the overly broad nature of DTE's requests. *Id.* Due to the overly broad nature of the request, the United States explained that it would limit its search for documents. *See* Dkt 87, Ex E. In particular, because DTE's document requests were essentially identical to requests served in related NSR litigation, the United States explained how it was producing a hard drive of documents that contained documents that had been produced in prior litigation and searching EPA Region 5 (the Region that includes Michigan) and Headquarters for additional responsive documents. While the United States reiterated its concerns to DTE on a call on February 11, 2011, DTE's counsel expressed no opinion about the reasonableness of the United States' limits and simply stated that DTE would respond at an unspecified later date.

On February 22, 2011, the Court conducted a telephonic conference to settle some of the outstanding discovery disputes among the parties. Importantly, at the time of the conference, DTE already had been reviewing the United States' first set of discovery requests for 25 days, and had been on notice of the United States' plans for responding to DTE's discovery for close to two weeks. During the telephonic conference, DTE requested that the trial be delayed until September due to the discovery the United States had sought. *See* Ex. 5 (Feb. 22, 2011 Telephonic Conference Transcript) at 11-12. The Court then ordered the Parties to set a schedule with a 90-day extension. *Id.* at 21. The Parties ultimately agreed to a schedule with a September 12, 2011 trial, just as DTE had requested and beyond the 90-days that the Court had contemplated. *See* Dkt. 82 (Scheduling Order). Neither the United States nor DTE have served additional discovery or added any additional witnesses to their respective witness lists since the February 22, 2011 telephonic conference.

Nearly two weeks after the United States informed DTE about the limits of its search for responsive documents, on February 23, 2011, DTE finally responded to Plaintiff's concerns about the breadth of DTE's requests for the production of documents. *See* Dkt. 87, Ex F. In a phone call that same day, counsel for DTE indicated that it would accept some limits, such as not searching the Bureau of Prisons or EPA offices unrelated to Clean Air Act enforcement, and agreed to consider some of the other limits, such as limiting the search for additional documents to Region 5 and Headquarters. On March 7, 2011, the United States formally responded to DTE's request for production of documents and began producing documents. *See* Dkt. 87, Ex. G. The United States produced a hard drive of documents collected largely collected between 2000 through 2008 in response to similar discovery requests in other cases and documents from updated searches in Region 5 and Headquarters offices responsible for nationwide implementation of NSR. Eleven days after the United States' deadline to respond to DTE's discovery requests, six weeks after the United States informed DTE how it was conducting its searches, and after the United States had begun producing documents, DTE definitively objected to the limits the United States had placed on its searches. *See* Dkt. 87, Ex L.

In response, EPA explained that the documents were produced in the normal course of business as required by Rule 34.[1] *See* Dkt. 87, Ex M. In addition, on April 6, 2011, the United States offered to provide DTE additional information in support of its claim that it was producing documents in the normal course of business. *See* Dkt. 87, Ex. U. DTE filed the instant motion two days later without ever explaining why it believed the United States fell short of the

[1] Curiously, DTE criticizes Plaintiff for making the assertion that the documents were being produced in the normal course of business for the first time on March 24, 2011. *See* Dkt. 87 at 8. However, DTE never raised the issue of whether EPA's production met the requirements of Rule 34 until March 18, 2011. *See* Dkt. 87, Ex. L. Plaintiff had no reason to respond earlier to an issue that DTE did not raise.

requirements of the rule and/or the company's instructions and without waiting for the supplementary information the United States had offered.[2]

II. Discovery in Prior New Source Review Litigation Involving Coal-Fired Power Plants

Like DTE, prior defendants in similar NSR enforcement cases brought in other parts of the country have requested information about the NSR regulations, EPA's interpretation of routine maintenance, and how EPA calculates emissions increases. As a result of discovery requests in those cases, the United States produced the relevant working papers of the agency – the body of administrative precedent used by those charged with the day-to-day interpretation and application of NSR, from all ten EPA regions and from EPA's Headquarters offices. The United States also searched 12 record centers and thousands of boxes of potentially responsive documents. These initial productions involved the review of more than 32.5 million pages of documents, and resulted in the United States producing more than 3.1 million pages of responsive documents as of 2004. *See* Ex. 1 at ¶4. In 2004, the United States again searched all ten EPA regions for electronic documents that had not been produced in the prior searches. These efforts required the search of more than 900 EPA employees and resulted in the review of 2.1 million pages and over 500,000 pages being produced to defendant utilities. *See* Ex. 2 at ¶10,

---

[2] On April 14, 2011, the United States again tried to resolve the dispute with DTE, explaining that the United States did not believe the dispute was properly before the court given DTE's failure to confer on its new claim that the documents had somehow not actually been produced as kept in the normal course of business. The United States emphasized that it had complied with DTE's instructions and further explained the origin of the documents that it had produced. On April 15, 2011, the United States provided DTE with custodian information for the documents that it had produced from EPA Region 5 and Headquarters as a result of its updated searches that are included in Exhibit 2, Attach. L. On April 18, 2011, the United States produced the detailed information about a large volume of information about the documents produced in prior litigations that is included in Ex. 2, Attach. G. On April 20, 20011, the United States provided the additional information that is included in Ex. 2, Attach. A, H, K.

Attach. I. When producing the documents, the United States has produced the documents in the same order with the same Bates number in multiple prior litigations. *Id.*

ARGUMENT

This case impacts public health, and should not be further delayed based on unreasonable discovery demands. The Parties have set a trial date based on DTE's requested timing, and the company says it is not seeking delay by its motion. Yet delay would inevitably follow, and there is no reason to allow it given the comprehensive production of responsive documents that DTE has now received.

I. The United States Has Complied with the Federal Rules by Producing Files as Kept

A. DTE's Motion Should be Denied Because the United States Has Complied with DTE's Specific Instructions as to the Form and Manner of Production

DTE's current motion to compel contradicts the instructions that DTE itself provided the United States as to the manner of production. In the instructions to DTE's Request for Production, DTE states: "Documents shall be retained in the order in which they are maintained, in the file where found." *See* Dkt. 87, Ex. D at Instructions, ¶4. DTE now argues that documents should not be produced as they are kept in the files but organized to correspond to its requests. DTE simply ignores its own instructions. Having specifically requested that the United States produce documents in the manner in which they are kept in the ordinary course of business, DTE can hardly be heard to complain that the United States complied with the company's explicit instructions. Indeed, the Rules clearly contemplate the Parties producing documents in any manner that is agreed. See Fed R. Civ. Proc. 34(b)(2)(E). Accordingly, DTE's instructions provide a reason by itself to deny DTE's motion to compel the production of documents in a manner that corresponds to its requests. *Compare In re Classicstar Mare Lease Litig.*, No. 5:07-cv-353, 2009 WL 260954, at *4 (E.D. Ky. Feb. 2, 2009) (ordering the producing

party to produce documents in a different form because, while they had complied with the federal rules, they had previously entered into a letter agreement with counsel to produce in a different form).

B. In Any Case, DTE's Motion Should Be Denied Because the United States Has Complied with the Federal Rules

The fact that the United States has complied with DTE's specific instructions is reason enough to hold that the United States has complied with the Rules. But even if DTE had not instructed that the documents be produced as they are kept, the United States' production would still be proper. Under Fed. R. Civ. P. 34(b)(2)(E), unless a parties stipulate or the court orders otherwise, a party has the option to produce the documents "as they are kept in the usual course of business *or* must organize and label them to correspond to the categories in the request." Fed. R. Civ. P. 34(b)(2)(E)(i) (emphasis added). The purpose of Rule 34(b) is to "guard against risks that a producing party might attempt to rearrange materials to obscure the importance of certain items." *See* 8B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2219 (3d ed. 2010). The United States has produced documents in accordance with the Rules. Indeed, the United States has produced them in a way that both (1) identifies the relevant office from which the document was produced, and (2) allows DTE to search each document for names, key words, dates, titles etc., which easily allows DTE to find documents related to issues that it believes are particularly relevant.

For instance, for all the documents produced as a result of the updated searches of Region 5 and Headquarters, the United States has provided custodian information, *see* Ex. 2 at ¶13, Attach. L, and a detailed description of the search and production of documents, *see* Ex. 3 at ¶¶4-13. This information is sufficient to show compliance with Rule 34. *See Nolan, L.L.C. v. TDC Intern. Corp.*, No. 06-CV-14907, 2007 WL 3408584, at *2 (E.D. Mich. Nov. 15, 2007) (holding

that a party demonstrates that the documents were produced in the usual course of business "by revealing such information as where the documents were maintained, who maintained them, and whether the documents came from one single source or file or from multiple sources or files").

For the documents produced from prior litigation, the United States has provided a variety of information regarding how the documents were produced, including where they were located and the circumstances of the prior production. *See* Ex. 2 at¶¶4, 12, 13. For example, the United States has produced a detailed chart indentifying a large number of the documents by Bates numbers, the custodian of those documents, and the subject matter of the document. *See* Ex. 2, Attach. B-F. The United States has also Bates numbered all of the documents to indicate the origin of the documents and provided a chart that explains the meaning of each of the Bates numbers. *See* Ex. 2 at ¶4, Attach. A, H, K. The information that the United States has provided is sufficient to demonstrate that it has not rearranged the documents or obscured the importance of any document, particularly as the documents are fully searchable. *See Zakre v. Norddeutsche Landesbank Girozentrale*, No. 03-cv-257, 2004 WL 764895, at *1 (S.D.N.Y. Apr. 9, 2004) (holding that when a company had documents in "as close a form as possible as they are kept in the usual course of business" and in a text-searchable format, the company had no further obligation to organize and label them to correspond with the requests). Clearly, the documents have also been produced in a manner to allow DTE to "make reasonable use of them." *Standard Dyeing & Finishing Co. v. Arma Textile Printers Corp.*, No. 85-cv-5399, 1987 WL 6905, at *2 (S.D.N.Y. Feb. 10, 1987); *see also* Wright & Miller § 2213 (3d ed. 2010). The United States is under no obligation to produce documents in "neat little packages." *Liddle v. Bd. of Educ. of City of St. Louis*, 771 F. Supp. 1496, 1499 (E.D. Mo. 1991).

Here, it would be unduly burdensome to require the United States to further categorize the documents in light of the extensive information regarding the manner of production that DTE has and the fact that DTE can ultimately search for responsive documents. *See* Wright & Miller § 2213 (3d Ed. 2010). In fact, commenters agree that:

> Requiring further that these requested materials be segregated according to the requests would impose a difficult and usually unnecessary additional burden on the producing party. The categories are devised by the propounding party and often overlap or are elastic, so that the producing party might be compelled to decide which best suits each item in order to consign it to the proper batch. Such an undertaking would usually not serve any substantial purpose, and it could become quite burdensome if considerable numbers of documents were involved.

Id. The United States has produced documents in a searchable format, which will allow DTE to perform computer searches for any documents that it seeks. *See Radian Asset Assur., Inc. v. College of the Christian Bros. of New Mexico*, No. Civ. 09-0885, 2010 WL 4928866, at *7 (D.N.M. Oct. 22, 2010) (holding that producing a large quantity of documents in searchable format meant that the producing party "did not hide the proverbial smoking gun in an ocean of production") (internal citations omitted). Importantly, according to DTE's counsel, DTE is identifying information that is responsive to the United States' requests for production by performing computer searches. Therefore, not only is DTE fully capable of performing searches but DTE believes it is a reasonable manner in which to locate responsive information. The implication of its motion is that computer searching for potentially responsive documents is good enough for identifying documents for Plaintiff, but not for Defendants.

Moreover, DTE is best suited to perform electronic search for documents – particularly as the United States' production is composed of only responsive material – because DTE can tailor its searches terms. *See generally Radian Asset Assur.*, 2010 WL 4928866, at *7 (holding that producing party was not required to perform computer searches that the requesting party was at

least equally capable of performing). For example, in request number 20, DTE seeks documents that relate to common words such as "routine," "repair," and "construction." *See* Dkt. 87, Ex. D at 13. The fact that the United States has provided the responsive documents in searchable format means that DTE itself can perform whatever additional tailored searches it desires, such as searching for "routine" and "economizer" and "maintenance." In contrast, the United States cannot limit its search in a similar manner because DTE has requested all documents related to the word "routine" in the context of NSR. *Id.* Given the volume of responsive documents and the information that the United States has provided about the origin of the documents, the burden of further categorizing the responsive documents is unjustified. *See generally Morgan v. City of New York*, No. 00-cv-9172, 2002 WL 1808233, at *4 (S.D.N.Y. Aug. 6, 2002) (holding that due to the volume of documents and the information that the party had provided about the documents, the party was not required to categorize the documents to correspond with the requests).

Finally, due to the large volume of responsive documents, categorizing the documents would be of little use to DTE when the documents have already been produced in a searchable format. With millions of pages in response to DTE's extraordinarily broad requests, categorization would inevitably result in references to tens of thousands of pages of responsive documents. Given the breadth of its requests, DTE cannot seriously contend that such an exercise might make discovery significantly more manageable. More likely, DTE will still need to perform searches of these pages in order to find whatever documents that it believes might advance its case.[3]

---

[3] In passing, DTE asserts that it was inappropriate to refer DTE to publicly-available databases of responsive documents. To the contrary, the websites are responsive to DTE's broad requests. With one exception, each website is searchable or related exclusively to NSR documents. The

C. The Production of Documents from Prior Nationwide New Source Review Discovery Complies with Rule 34(b)

The United States' production of documents previously produced in other similar litigation complies with the Federal Rules of Civil Procedure. Importantly, DTE's complaints overstate the difficulties that DTE may have in finding documents. First, DTE claims to be "surprised by the manner and form" of the United States' production. *See* Dkt. 87 at 9. There was no surprise here. In addition to understanding the manner of the United States' production based on discussions weeks before the production began, DTE's counsel also participated in litigation in similar NSR cases in which documents have been produced in identical formats, including *United States v. Duke Energy Corp.*, *United States v. Ohio Edison Co.*, and *United States v. East Kentucky Power Coop. See* Ex. 6 (*Duke Energy*); Ex. 7 (*Ohio Edison*); Ex. 8 (*East Kentucky Power Coop.*); *see also* Ex. 2 at ¶13. In this case, the United States produced identical copies of documents with the identical Bates numbers produced in these prior litigations involving DTE's counsel, including production of a similar hard drive of documents from prior litigation. *See* Ex. 9 (Letter between Bierbower and United States regarding a hard drive). Since DTE's counsel was aware of the manner in which documents had been produced in the past, DTE can hardly now argue that it is "surprised" by the manner of production when the United

---

one exception can be easily limited to Clean Air Act documents and merely contains information about settlements such that relevant settlements are easily identified. Due to the overly broad nature of DTE's requests in terms of both time and scope, these websites contain voluminous amounts of responsive documents. Directing DTE to these publicly-available sources of documents easily meets the requirements of the rules, particularly since it is clearly less burdensome for DTE to query the databases for whatever documents it believes are relevant. *See In re Google AdWords Litig.*, No. C08-03369, 2010 WL 4942516, at *3 (N.D. Cal. Nov. 12, 2010) ("Here, the Court believes that would be more convenient, less burdensome, and less expensive for Google to search for these publicly-available documents on any of the available electronic databases than to require Plaintiffs to comb through their entire collection of past case files (RFP No. 34 is not limited to any particular jurisdiction or defined time period, after all) for documents of doubtful relevance.")).

States had clearly indicated that it was producing the same documents in the same manner that it had previously produced in similar cases.

Second, DTE argues that, by producing documents that are responsive to its requests, the documents cannot be produced in the normal course of business. *See* Dkt. 87 at 12-13. If DTE's arguments were true, a party could never seek to produce documents in the normal course of business unless it merely produced its entire file cabinet without regard to whether every document is responsive. DTE seems to argue either that Rule 34 requires the production of non-responsive documents to maintain the normal course of business or the portion of Rule 34(b)(2)(e)(i) allowing for production in the normal course is entirely meaningless. Essentially, DTE's argument fails to distinguish between cases where the documents were gathered and organized in anticipation of or during the course of litigation and instances where a party produced the same documents, as they are kept in the usual course of business, multiple times because they are responsive to the same or substantially similar requests for production from multiple defendants.

Principally, DTE relies on *Mizner Grand Condo. Ass'n, Inc. v. Travelers Property Casualty Co. of America*, 270 F.R.D. 698 (S.D. Fla. 2010) and *SEC v. Collins & Aikman Corp.*, 256 F.R.D. 403 (S.D.N.Y. 2009) to support its argument. The manner in which the documents were organized and produced by the responding parties in those cases clearly differs from that used by the EPA in this case. In *Mizner Grand*, the court held that documents that the responding party came to "possess" during the course of prior litigation were not documents kept in the usual course of business. 270 F.R.D. at 700-01. In *SEC v. Collins & Aikman Corp.*, the SEC turned over 1.7 million documents (approximately 10.6 million pages) contained in 36 different databases, only a portion of which were responsive to Collins & Aikman's requests.

256 F.R.D. at 407, 408 n.10. The documents constituted the SEC's entire file of information on which it based its accusation that Collins & Aikman had engaged in securities fraud. *Id.* at 405, 408 n.10. The *Collins & Aikman* court held that documents the SEC's generated in its investigation of Collins and Aikman were not kept in the usual course of business because they lacked a "predictable system" of organization normally associated with documents routinely and repetitively produced. *Id.* at 413.

The documents EPA has produced to DTE were not created and organized while it was building its case against DTE or its prior cases under the power plant initiative and are therefore distinguishable from the documents in *Mizner Grand* and *Collins & Aikman*. The vast majority of DTE's requests and the documents produced in response to those requests concern EPA's interpretation of the relevant portions of the Clean Air Act and regulations, *see e.g.,* Doc. 87 Ex. G, Request Nos. 17, 20, and EPA's 41-year regulatory oversight of coal-fired utilities and other industries under the Clean Air Act. *See e.g.,* id. at Request Nos. 11, 12, 13, 15, 16, 18, 21, 23, 24, 30, & 31. These are precisely the activities in which EPA routinely and regularly engages as the agency charged with administering the Clean Air Act. Thus, EPA may produce the documents as they were kept in the usual course of business.

DTE also argues that EPA has not produced documents as they were kept in the normal course of business because they have been placed in storage. Doc. 87 at 13. However, producing documents from storage is consistent with Rule 34(b). *See In re Sulfuric Acid Antitrust Litig.*, 231 F.R.D. 351, 363 (N.D. Ill. 2005) ("This is not to say that production of documents as they are kept in storage is never proper under Rule 34(b)."). Moreover, if the production of documents in the original cases were done in the normal course of business, the reproduction of the same documents in the same manner does not change the way the documents were kept. *See*

Radian Asset Assur., Inc. v. College of the Christian Bros. of New Mexico, No. Civ. 09-0885, 2010 WL 4928866, at *6 (D.N.M. Oct. 22, 2010) ("Merely transferring material between parties, however, does not necessarily alter how it was 'kept.'").

D. The United States Has Done a Responsiveness Review for the Documents It has Produced

None of the NSR cases cited by DTE demonstrate that the United States' production is a document dump. In *United States v. Illinois Power Co.*, No. 99-833 (S.D. Ill. Oct. 23, 2001), the United States had collected 154,000 boxes that had *potentially* responsive documents that it had collected from its archives. *See* Dkt. 87, Ex S at 1. In that case, given that the documents were already in the federal archives, the United States sought to produce all 154,000 boxes to defendants without conducting a responsiveness review, and to have defendants designate specific documents for production prior to engaging in a privilege review. *Id.* at 1-2. The court rejected this proposal and held that, in order to comply with Rule 34, the United States must do a responsiveness review of archived documents. *Id.* at 2-3 (stating "it is the responsibility of the party from whom documents are requested to determine in the first instance which of the many documents it possess are responsive."). *Illinois Power* is inapposite. In the present case, the United States *has* done a responsiveness review; there is no "dump" of non-responsive documents. The United States has complied with the court's decision in *Illinois Power*.

DTE also attempts to bootstrap its argument by citing to the court's decision in *United States v. Duke Energy Corp.*, No. 00-cv-1262 (M.D.N.C. Dec. 13, 2001), but that decision provides no support. *See* Dkt. 87, Ex Q. In *Duke*, the court granted a five month extension based on "related litigation" where the United States had been ordered to "segregate relevant documents." *Id.* at 1. In fact, the *Duke* court was referring to the court's decision in *Illinois Power* requiring the United States to perform a responsiveness review of archived documents – a

review that subsequently took place. *See* Ex. 10 (*Duke* Motion for Extension). As discussed above, the *Illinois Power* decision provides no support for DTE's arguments, since the United States has conducted a responsiveness review. Next, DTE cites to a second decision in *Duke*. However, in that decision, the court ordered the United States to identify documents in response to a narrow request served with a deposition notice under Rule 30(b)(5). *See* Dkt. 87, Ex. R. The court never stated that the United States failed to comply with Rule 34(b) and did not require the United States to correlate its documents to a specific document request from the defendant. *Id.*

Finally, in *SEC v. Collins & Aikman Corp.*, the SEC produced a large volume of documents, *only a portion of which were responsive* to Collins & Aikman's requests. 256 F.R.D. 403, 407, 408 n.10 (S.D.N.Y. 2009). Here, the United States did not simply produce documents and tell DTE to search for responsive documents. The United States produced responsive documents that happened to be a large quantity due to be the broad nature of DTE's requests.

At bottom, DTE's complaint is that the United States has produced a large volume of documents. However, DTE served broad requests. For example, DTE specifically sought more than 41 years worth of documents "discussing, describing, referring to or *relating in any way*" to a list of 15 terms for every individual in EPA involved in the enforcement of the Clean Air Act. *See* Defendants' First Request for Production of Documents, No. 20, Dkt. 87, Ex. D (emphasis added). With such sweeping requests, DTE could only have expected to receive large volumes of information. *See Burt Hill, Inc. v. Hassan*, No. Civ.A. 09-1285, 2010 WL 419433, at *8 n. 10 (W.D. Pa. Jan. 29, 2010) ("Although Defendants characterize Plaintiff's production of over 14,000 responsive documents as a 'document dump,' ... this is exactly what their overbroad discovery request contemplates."); *Renda Marine, Inc. v. United States*, 58 Fed. Cl. 57, 64 (Fed.

Cl. 2003) (holding the volume of documents produced did not preclude a conclusion that the production complied with the Federal Rules). Moreover, DTE admits that "[g]iven the complexity of the case and the experience of other NSR cases, Detroit Edison is not surprised by the volume of documents EPA has produced." *See* Dkt. 87 at 8.

II. The United States Reasonably Limited its Search Due to DTE's Overly Broad Overly Burdensome Requests

In addition to arguing that the United States has produced too many documents, DTE argues that the United States has produced too few. Specifically, DTE argues that the United States should be required to produce documents from all ten EPA regions for the past seven years. The Federal Rules of Civil Procedure require a balance of the benefit of the production against the associated burdens. Fed. R. Civ. P. 26(b)(2). District courts can "limit the scope of discovery where the information sought is overly broad or would prove unduly burdensome to produce." *Surles ex rel. Johnson v. Greyhound Lines, Inc.*, 474 F.3d 288, 305 (6th Cir. 2007); *see also Scales v. J.C. Bradford & Co.*, 925 F.2d 901, 906 (6th Cir. 1991) (the "desire to allow broad discovery is not without limits and the trial court is given wide discretion in balancing the needs and rights of both plaintiff and defendant.").

Faced with DTE's requests to search every agency in the federal government for responsive documents with no limit on the timeframe for responsive documents, the United States appropriately and necessarily limited its search. The United States informed DTE of the limits it was using within nine days of its requests, and DTE failed to respond at all for 12 days and did not definitively object to these limits for 36 days, which was after the United States began producing documents. The United States has produced documents from all ten EPA regions for 34 of the 41 years covered by DTE's requests as well as documents through the present from EPA Region 5 and Headquarters.

Importantly, EPA has produced documents that reflect nationwide discovery for all relevant years. Through the searches of Region 5 and Headquarters, the United States has produced documents from EPA Headquarters, which includes documents from all EPA regions that the Headquarters offices obtain as part of their nationwide coordination of the NSR program. EPA Headquarters includes the Office of Air Quality Planning and Standards ("OAQPS"), which is an office that develops regulations to implement the Clean Air Act and coordinates with other EPA regions, as well as state and local agencies in developing regulations. Accordingly, DTE is getting nationwide discovery, including documents reflective of NSR implementation in all regions. Therefore, DTE will be receiving the DTE specific documents that support the Plaintiff's complaint as well as documents responsive to DTE's requests that cover the full 41 year history of the Clean Air Act.

Producing documents from all ten regional offices cannot be justified because the search will result in a largely duplicative production. The Headquarters offices are responsible for setting policy, developing the legal and regulatory positions of the Agency, and disseminating guidance to the Regional offices on matters relevant to the issues in this litigation. Through these central locations and through efforts made to collect general materials related to NSR implementation,[4] Defendant has the relevant materials not just from Region 5, but from all across the Agency. This has proven true in prior cases. For example, in *Illinois Power*, the defendant's exhibit list for trial was more than 2,000 documents – all of which were ultimately produced from Region 5 or Headquarters. *See* Ex. 1 at ¶6.

---

[4] For example, DTE has access to a variety of publically available searchable databases including the New Source Review Policy and Guidance Database, the Clean Air Act Applicability Determination Index, and The New Source Review Rulemaking. *See* Dkt. 87, Ex. G at 3.

DTE's motion makes no mention of the burden of its request for discovery because the burden cannot be justified in light of the volume of information that DTE has received. While responsive documents will be produced in a search of all ten regions, relevance does not conclusively prove that DTE is entitled to such discovery. *See World Healthcare Sys., Inc. v. Surgical Servs., Inc.*, No. 10-cv-60, 2011 WL 849318, at *1 (E.D. Tenn. Mar. 8, 2011) ("A court has discretion to limit or even preclude [relevant] discovery . . . if the discovery is unreasonably cumulative or duplicative, or the burden, inconvenience, or expense of providing discovery outweighs the likely benefits."). According to EPA's estimates, DTE's request would require the United States to review an estimated additional 1.9 million emails, 1,434 Gigabytes (GB) of electronic documents, and nearly a mile worth of paper documents. *See* Ex. 3 at ¶14. Notably, the United States has already spent approximately 3000 hours by 40 employees responding to DTE's requests. *Id.* at ¶13.

These numbers are supported by the burden of prior searches of all EPA offices. In 2000 and 2001, the United States searched for and produced responsive material from over 66 EPA offices nationwide, numerous Federal Records Centers, and 1,115 federal employees. *See* Ex. 1 at ¶3. The United States expended more than 112,000 hours (54 work years) and spent $6 million to respond to these requests. *Id.* In 2004, the United States again conducted a search of approximately 900 federal employees – again throughout all ten EPA regions. *See* Ex. 11 (Aug. 9, 2004 Cinergy Status Report) at 5.

The court's decision in *Illinois Power* does not compel a contrary result. In *Illinois Power*, EPA originally searched Headquarters and 3 regional EPA offices. *See* Dkt. 87, Ex. V at 2-3. The court required EPA to search all EPA offices that are involved in the enforcement of the Clean Air Act for responsive documents. *Id.* at 4. However, the defendants in *Illinois Power*

had not received documents resulting from a search of all ten EPA regions. Here, the United States has produced millions of pages of documents that were the result of a search from all ten EPA regions. Due to the volume of discovery DTE has received, this Court is faced with a much different situation than the court faced in *Illinois Power*. In this case, the burden of searching all ten EPA Regions far outweighs the benefits.

In the just over one page that DTE devotes to this issue (which shows its importance to the company), DTE fails to articulate why these documents are relevant, other than to state that it is entitled to documents to support its view that EPA's interpretation is a "litigation position." *See* Dkt. 87 at 16. However, DTE has no argument that a production of these documents from the last seven years would support that position and would not have already been produced in the 34 years worth of nationwide discovery that DTE already has, particularly since it is getting discovery from throughout the country through the search of Headquarters. Importantly, if Plaintiff's interpretation of the regulations was truly a "litigation position," one would expect that to be made clear from the office that is responsible for drafting the regulations, and the United States has produced discovery for all 41 years of the Clean Air Act from that office. A fishing expedition into the "view of EPA personnel" of other regions with no responsibility for implementing or enforcing the law that is actually applicable to DTE's plants is not justified due to the heavy burden that it places on the United States. *See Surles*, 474 F.3d at 305; *Case v. Goodyear Tire & Rubber Co.*, No. C87-1445A, 1989 WL 418792, at *5 (N.D. Ohio June 13, 1989) (holding that a parties' "unsupported suspicions are insufficient to justify the burdensome discovery sought.").

III. The United States' Response to the Interrogatories Is Compliant with Rule 34(d)

DTE argues that the United States' reference to documents in response to DTE's interrogatory requests requires the United States to further identify the documents. For each interrogatory response that DTE cites, the United States provided a lengthy and detailed written response. The fact that the United States exceeded the requirement of the Rule by also notifying DTE that documents were produced that would also answer the response does not render the United States' existing response inadequate. Importantly, DTE has never challenged the adequacy of the United States written responses. For these reasons, as well as for the reasons discussed in Section I, the Court should deny DTE's request that the United States identify documents in response to DTE's interrogatories, and confirm that the United States has no further obligation to correlate specific documents to DTE's discovery requests.

CONCLUSION

Plaintiff respectfully requests that the Court deny the motion and allow the Parties to proceed to the merits of this case.

Respectfully Submitted,

IGNACIA S. MORENO
Assistant Attorney General
Environment & Natural Resources Division

Dated: April 22, 2011

/s/ Kristin M. Furrie
JAMES A. LOFTON
JUSTIN A. SAVAGE
THOMAS A. BENSON (MA Bar # 660308)
KRISTIN M. FURRIE
Environmental Enforcement Section
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
(202) 616-6515
Kristin.Furrie@usdoj.gov

OF COUNSEL:
SABRINA ARGENTIERI
MARK PALERMO
SUSAN PROUT
Associate Regional Counsel
U.S. EPA Region 5
Chicago, IL

77 W. Jackson Blvd.

APPLE CHAPMAN
Attorney Advisor
U.S. EPA
1200 Pennsylvania Ave. NW
Washington D.C. 20460

BARBARA McQUADE
United States Attorney
Eastern District of Michigan

ELLEN CHRISTENSEN
Assistant United States Attorney
211 W. Fort St., Suite 2001
Detroit, MI 48226

CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2011, the foregoing brief in opposition was filed electronically using the Court's ECF system and served on counsel of record via ECF.

s/ Kristin M. Furrie
Counsel for the United States